OCBC BANK (MALAYSIA) BHD v. LIM HOCK KOK & ANOR

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
IDRUS HARUN JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: J-02(IM)(NCVC)-1578-08-2016]
26 MAY 2017

CIVIL PROCEDURE: *Summary judgment – Banking – Triable issues – Claim for repayment of loan under facilities agreement between bank and borrowers – Facilities agreement contained clause that bank had right to seek further security from borrowers – Borrowers charged property valued by bank's valuer – Bank later required from borrowers further security at lesser value – Conflict in valuations prepared by bank's valuers – Whether borrowers entitled to know how and why there was substantial difference in valuations – Whether borrowers had defence to claim – Whether summary judgment ought to be granted – Rules of Court 2012, O. 14*

CONTRACT: *Agreement – Breach – Bank granted loan to borrowers under facilities agreement – Facilities agreement contained clause that bank had right to seek further security from borrowers – Borrowers charged property valued by bank's valuer – Bank later required from borrowers further security at lesser value – Borrowers did not accede to bank's request – Whether borrowers' failure to comply with clause in agreement amounted to default – Whether borrowers' consistent payment of monthly instalments valid defence for breach of agreement – Whether bank entitled to terminate contract*

BANKING: *Loan – Security for loan – Bank granted loan to borrowers under facilities agreement – Facilities agreement contained clause that bank had right to seek further security from borrowers without qualification, pre-condition or negotiation with borrowers – Borrowers charged property valued by bank's valuer and later required to execute further security at lesser value – Borrowers did not accede to bank's request – Whether borrowers' failure to comply with clause in agreement amounted to default – Whether bank entitled to terminate contract*

By way of a letter of offer ('LO') and facilities agreement ('the FA'), the appellant granted a loan of RM2,800,000 to the respondents to finance the purchase of a property and for the respondents' working capital. As security, the respondents charged the property which was valued by the appellant's valuer at RM3,500,000. *Vide* a notice, the appellant later required the respondents to execute further security valued at no less than RM2.2million. The respondents did not comply with the said notice, causing the appellant to recall and terminate the loan. The appellant demanded repayment of the total amount outstanding under the loan together with interest. When the respondents paid no heed to the appellant's demands, the latter filed an application for summary judgment under O. 14 of the Rules of Court 2012

('the ROC') at the High Court to recover the loan in the sum of RM2,773,435.99. The High Court Judge ('the HCJ') held that there were triable issues warranting refusal of a summary judgment as (i) there were two conflicting valuations prepared by the appellant's own valuers; and (ii) the respondents were entitled to know how and why there was substantial difference in the valuation. Hence, the present appeal. The appellant contended that (i) it had an unfettered right to seek further security from the respondents under cl. 12(3) of the FA not subject to any qualification, pre-condition or negotiation with the respondents; (ii) the respondents' failure to comply with the said clause amounted to an event of default under cl. 13 of the FA, entitling the appellant to terminate the contract. On the other hand, the respondents argued that (i) the appellant's case was not a simple and straightforward one as the variance in the valuations was a serious triable issue which the respondents could only challenge at the trial by examination of the valuers; and (ii) they did not commit any default in the repayment of the loan.

Held (allowing appeal; setting aside order of High Court)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The LO and the FA were a valid contract. If a contract entered into between the parties is valid, it would be incumbent upon the court to uphold the bargain that has been struck between the parties. Clause 12(3) of the FA gave the appellant an unrestricted and unimpeded right to require the respondents to furnish further security. There was nothing in cl. 12(3) that required the appellant to give any ground, justification or reason for the exercise of the right. Even though the appellant exercised the right after a second valuation of the charged property showed a diminution in the value, this did not confer any right on the respondents to know how and why there was a substantial difference in the valuation. The HCJ conferred extra rights to the respondents and imposed an obligation on the appellant which the contracting parties had never agreed to. It is not for the court to rewrite a contract freely entered between two contracting parties or to read into a contract conditions that have not been put there by the parties. (paras 11, 14 & 15)

(2) This case involved nothing more than an enforcement of the appellant's contractual rights as provided for under the FA. The difference in the two valuation reports had nothing to do with the exercise of the appellant's rights under cl. 12(3) of the FA and did not qualify as a triable issue. The issue at hand was the proper and correct interpretation of the FA, in particular cls. 12(3) and 13. The appellant had properly exercised its contractual right pursuant to the FA. (paras 21 & 22)

(3) The respondents were bound by the terms and conditions stipulated in the LO and the FA. Their defence did not address or touch on such contractual rights in cl. 12(3) of the FA to require the respondents to furnish additional security. The respondents' claim that they did not

default in the payment of monthly instalments was not and could not be a defence to the breach of their obligations in cl. 12(3) of the FA. The respondents' case was an attempt to deflect attention from their contractual obligation or liability to the appellant. It was clear in O. 14 r. 1(1) of the ROC that the appellant was entitled to apply to the court for judgment on the ground that the respondents have no defence to the claim. The respondents failed to satisfy the court in accordance with O. 14 r. 3(1) of the ROC that there was an issue or question in dispute manifested in the defence which ought to be tried or that there ought, for some other reason, to be a trial of that claim. (paras 16, 17 & 21)

***Bahasa Malaysia** Headnotes*

Melalui satu surat tawaran ('ST') dan perjanjian kemudahan ('PK'), perayu memberi pinjaman berjumlah RM2,800,000 kepada responden-responden untuk membiayai pembelian sebidang hartanah dan bagi modal kerja mereka. Sebagai cagaran, responden-responden memajak hartanah tersebut yang, berdasarkan penilaian penilai perayu, bernilai RM3,500,000. Melalui satu notis, perayu mengkehendaki agar responden-responden melaksanakan cagaran lanjut bernilai tidak kurang daripada RM2.2 juta. Responden-responden tidak mematuhi notis tersebut dan ini menyebabkan perayu menarik balik dan menamatkan pinjaman. Perayu seterusnya menuntut bayaran semula jumlah pinjaman yang terhutang serta faedahnya. Apabila responden-responden tidak mempedulikan tuntutan-tuntutan perayu, perayu memfailkan permohonan penghakiman terus bawah A. 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') di Mahkamah Tinggi untuk mendapatkan semula pinjaman berjumlah RM2,773,435.99. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa terdapat isu-isu untuk dibicarakan yang mewajarkan penolakan penghakiman terus kerana (i) penilaian penilai-penilai perayu saling bercanggah; dan (ii) responden-responden berhak tahu bagaimana dan mengapa wujud perbezaan besar dalam penilaian. Maka timbul rayuan ini. Perayu menghujahkan (i) mempunyai hak tidak terhad untuk meminta cagaran lanjut daripada responden-responden bawah kl. 12(3) PK tanpa apa-apa kelayakan, pra-syarat atau rundingan dengan responden-responden; (ii) kegagalan responden-responden mematuhi klausa tersebut satu keingkaran bawah kl. 13 PK dan ini memberi perayu hak menamatkan kontrak. Sebaliknya, responden-responden mendalihkan (i) kes perayu tidak jelas dan mudah kerana kepincangan dalam penilaian adalah isu serius yang perlu dibicarakan dan responden-responden hanya boleh mencabar fakta ini melalui pemeriksaan penilai-penilai semasa perbicaraan; dan (ii) mereka tidak ingkar dalam bayaran semula pinjaman.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Surat tawaran dan PK adalah kontrak sah. Jika kontrak yang dimeterai pihak-pihak sah, mahkamah wajib mengesahkan kontrak pihak-pihak tersebut. Klausa 12(3) PK memberi perayu hak yang tidak terbatas dan

tidak terhalang untuk mewajibkan responden-responden mengemukakan cagaran lanjut. Tiada apa-apa dalam kl. 12(3) yang mengkehendaki agar perayu memberi alasan, penjelasan atau sebab bagi pelaksanaan hak ini. Walaupun perayu melaksanakan hak tersebut selepas penilaian kedua hartanah yang dipajak menunjukkan pengurangan nilai, ini tidak memberi responden apa-apa hak untuk tahu bagaimana dan mengapa wujud perbezaan besar dalam penilaian. Hakim Mahkamah Tinggi memberi hak-hak sampingan kepada responden-responden dan mengenakan satu kewajipan atas perayu dan ini tidak pernah disetujui oleh pihak-pihak berkontrak. Mahkamah tidak boleh, dengan bebas, menulis semula kontrak yang dimasuki dua pihak berkontrak atau menyiratkan, dalam kontrak tersebut, syarat-syarat yang tidak dimasukkan oleh pihak-pihak.

(2) Kes ini melibatkan tidak lebih daripada pelaksanaan hak-hak kontraktual perayu seperti yang diperuntukkan dalam PK. Perbezaan antara dua laporan penilaian tiada kaitan dengan pelaksanaan hak-hak perayu bawah kl. 12(3) PK dan bukan isu yang boleh dibicarakan. Isu yang timbul adalah tafsiran PK yang betul dan tepat, khususnya kl. 12(3) dan 13. Perayu melaksanakan hak kontraktualnya bawah PK dengan betul.

(3) Responden-responden terikat dengan terma dan syarat dalam ST. Pembelaan mereka tidak menyatakan atau menyentuh hak-hak kontraktual bawah kl. 12(3) PK yang mewajibkan responden-responden mengemukakan cagaran tambahan. Dakwaan responden-responden bahawa mereka tidak ingkar dalam bayaran ansuran bulanan bukan dan tidak boleh dijadikan pembelaan terhadap pelanggaran kewajipan mereka bawah kl. 12(3) PK. Hujahan responden-responden hanya satu cubaan mengalihkan perhatian daripada kewajipan kontraktual atau tanggungan terhadap perayu. Jelas bawah A. 14 k. 1(1) KKM bahawa perayu berhak memohon daripada mahkamah satu penghakiman atas alasan responden-responden tiada pembelaan terhadap tuntutan. Responden-responden gagal memuaskan mahkamah, seperti yang disyaratkan oleh A. 14 k. 3(1) KKM, bahawa terdapat isu atau pertikaian dalam pembelaannya yang patut dibicarakan atau wajar, atas alasan lain, diadakan perbicaraan tuntutan tersebut.

Case(s) referred to:

Bank Industri & Teknologi Malaysia Bhd v. Ironwoods Shipyard Sdn Bhd & Ors [2006] 6 CLJ 269 HC ***(refd)***

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chuah Tim Lan v. RHB Bank Bhd & Anor [2008] 6 CLJ 500 CA ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 14 rr. 1(1), 3(1)
Rules of the Court of Appeal 1994, rr. 77, 102

For the appellant - R Paramanandan & Clarence Edwin; M/s Clarence Edwin Law Offices
For the respondent - S Balasekaran, Karthig Shan & Daing Nurul Mahfuzah; M/s Bala & Co

[Editor's note: For the High Court judgment, please see OCBC Bank (Malaysia) Berhad v. Lim Hock Kok & Anor [2016] 1 LNS 782 (overruled).]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

[1] This is an appeal against the decision of the High Court given on 9 August 2016 in dismissing the appellant's application under O. 14 of the Rules of Court 2012 for summary judgment on its claim against the respondents. The appellant and the respondents are the plaintiff and defendants respectively in the proceedings before the High Court.

[2] Before we embark upon a detailed consideration of the contentions that have been raised before us in this appeal, it is necessary to draw attention to one aspect of the proceedings which behoves this court to dispose of the matter first. Apparently, the record of appeal, which consists of only one volume of documents has more than 300 pages. The respondent, in consequence, raised a preliminary objection to the appellant's appeal contending that Practice Direction No. 2 of 2008 had not been complied with by the appellant as the said practice direction requires each volume of the record of appeal shall not exceed one hundred pages. We would necessarily mention that Practice Direction No. 2/2008 has been superseded by Practice Direction No. 1 of 2011 with effect from 22 November 2011. Practice Direction No. 1 of 2011 stipulates that each volume of a record of appeal shall not exceed 200 pages. However, Practice Direction No. 1 of 2011 has been revoked by the present Practice Direction No. 1 of 2017 which was issued on 28 February 2017. Nevertheless, since this appeal was filed on 17 August 2016, Practice Direction No. 1 of 2011 applies. Learned counsel for the respondents, citing the judgment of this court in *Chuah Tim Lan v. RHB Bank Bhd & Anor* [2008] 6 CLJ 500; [2008] 6 MLJ 793 submitted that, in not complying with the practice direction in question, the appellant did so at its own risk and that non-compliance thereof would mean that there was no proper appeal before this court.

[3] We accept that the appellant did not comply with Practice Direction No. 1 of 2011, however, we find that such non-compliance is merely in respect of the number of pages allowed for each volume of the record of appeal whereby the record of appeal filed in respect of the present appeal had exceeded the permissible number of pages prescribed under the said practice

direction. One thing seems to be clear, that is that, judicial authorities show that practice directions are effected for administrative purposes, but it is trite that once practice directions have been properly and legally issued, they must be complied with (*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645). For the Court of Appeal, the President of the Court of Appeal is empowered by r. 77 of the Rules of the Court of Appeal 1994 to issue practice directions. In this case, in our judgment, the record of appeal has exceeded the prescribed number of pages by only 100 pages. The non-compliance in this regard is of nature which in our opinion is so insignificant and trivial that it cannot be said that the respondents have been prejudiced in any way. There is clearly no substantial miscarriage of justice involved. Moreover, by virtue of r. 102 of the Rules of the Court of Appeal 1994, non-compliance with any rule of practice shall not render any proceedings void unless the court so directs and indeed we have no reason whatsoever to so direct. We are also mindful that under O. 1A of the Rules of Court 2012, the court or a judge shall have regard to the justice of the case and not only to the technical compliance of any rules.

For the reasons that we have given, we would hold that there is no merit in the preliminary objection as such it is dismissed.

[4] With our ruling on the preliminary objection, we shall proceed to consider the appeal. The background to this case is sufficiently set out in the statement of claim. So far as the facts relate to the application under appeal, we begin by stating that the appellant is a licensed bank in Malaysia whereas the respondents run a partnership business which they have registered as a firm by the name of "Ictinus Home And Building Constructions And Designs (JM0441052-T)". The facts that can be discerned from the statement of claim and the appellant's affidavit in support of the summary judgment application deposed on 25 March 2016 reveal the offer of a term loan of RM2,800,000 (the loan) by the appellant to the respondents at the latter's request. The loan was granted strictly upon the terms and conditions of contract contained in the appellant's letter of offer dated 22 January 2015 (exh. P1) and the facilities agreement dated 24 February 2015 (exh. P2), both of which the defendants accepted and executed. These facts are not in dispute. Based on the background facts as found by the learned judge, the loan was intended to finance the purchase of a piece of land with one and a half storey detached factory (the property) thereon and for the respondents' working capital. As a security, the respondents charged the property which was valued by the appellant's appointed valuer namely JS Valuers Property Consultant (Johore) Sdn Bhd on 23 February 2015 at RM3,500,000 (exh. 'A').

[5] In the event which transpired, by a letter dated 5 November 2015 (exh. P3), the appellant by notice issued through its solicitors, required the respondents to execute further mortgages, charges, assignments pledges or other assurances valued at no less than RM2.2 million as further security for the repayment of the loan. This was done in line with the appellant's contractual right under cl. 12(3) of the facilities agreement. The appellant

exercised this contractual right due to a recent valuation dated 5 August 2015 (exh. P4) of the existing security that is the property, by a registered valuer appointed by the appellant namely PA International Property Consultant Sdn Bhd assessing the market value of the property at only RM858,000 which was insufficient to fully secure the total amount outstanding under the facilities agreement. The respondents, however, did not comply with the aforesaid notice. As such, the appellant through its solicitors sent a notice dated 23 February 2016 (exh. P5) to the defendants to recall and terminate the loan. The appellant in that notice demanded repayment of the total amount outstanding under the loan together with interest thereon at the contractual rates. Once again, the notice went unheeded. The appellant accordingly commenced this action against the respondents in the High Court to recover the loan in the sum of RM2,773,435.99, interest thereon and cost.

[6] The learned judge in his decision found that there were two conflicting valuations prepared by the appellant's own valuers. How they came to their respective figures pertaining to the value of the property, the learned judge said, would involve numerous factors and considerations taken by both valuers which in His Lordship's view should be assessed at full hearing of the action. The respondents were entitled to know how and why there was a substantial difference in the valuation and whether in these circumstances they really did commit a default in not furnishing further security. On that score, the learned judge held that there were triable issues warranting the refusal of summary judgment.

[7] From the position adopted by the appellant as could be gleaned from the grounds of appeal, it is clear to us that the appeal turns principally on the contention that the appellant has an unfettered right to seek further security from the respondents under cl. 12(3) of the facilities agreement not subject to any qualification, precondition or negotiation with the respondent and that the respondents' failure to comply with the said clause amounts to an event of default under cl. 13 thereof which entitles the appellant to terminate the contract. The ancillary issue arising from the main issue concerns with the omission on the part of the learned judge to hold that the respondent's failure to comply with the appellant's call for further security resulted in a breach of the terms of the contract which entitles the appellant to terminate the contract under cl. 13.

[8] As is to be expected, before this court, the points taken by the respondents in submitting that there were serious triable issues and that the appellant's case is not a simple and straightforward case mainly concern with the conflicting valuations of the property one of which was made at the time the loan was sought for and granted assessing the property for RM3,500,000 and the subsequent report valuing the property for RM858,000 which prompted the appellant to request for further security and that the respondents did not default in the payment of the loan repayment instalments. The two valuations which are at material variance, learned counsel submits, is a serious triable issue which the respondent can only

challenge at the trial by examination of the respective valuers. Before stating the grounds of our decision further, it is necessary to construe cl. 12(3) of the facilities agreement dated 24 February 2015 which we now quote in full:

> **(3) Covenant to provide further security**
>
> **The Borrower will if required by the Bank at its own cost, execute such further legal or other mortgages, charges,** debentures, assignments, transfers, agreements **or other assurances as the Bank shall require to secure the Indebtedness.** (emphasis added)

On the language employed in cl. 12(3), we accept the submission of learned counsel for the appellant that the respondents' covenant to provide further security is couched in plain, unambiguous and unequivocal term and leaves no room for any further matter or word to be read or imported into it. To emphasise our point, by cl. 12(3), the respondents agree to provide further security to the appellant to secure the loan if the appellant requires the respondents to do so. The present case, in our opinion, involves nothing more than the enforcement of the appellant's contractual rights. So far as the evidence shows on the face of the pleadings, the respondents, as earlier stated, do not dispute that they are bound by the terms and conditions of contract as spelt out in the letter of offer dated 22 January 2015 and the facilities agreement dated 24 February 2015.

[9] It is of some significance to also emphasise that there is nothing in cl. 12(3) which imposes any restrictions or limitations or places any pre-conditions before the appellant may invoke the stipulation therein. There is indeed nothing in cl. 12(3) that requires the appellant to provide justification for the exercise of the contractual right contained in it. Even so, the appellant exercised its rights under cl. 12(3) only after obtaining a recent valuation of the security which shows the value drastically different from what the appellant originally believed it to be. Since the respondents failed to comply with their obligation to the appellant under cl. 12(3) of the facilities agreement, we have no reason to doubt that the respondents committed an event of default, which is spelt out in cl. 13(1) thereof.

[10] The relevant cl. 13(1)(b) of the facilities agreement reads:

> 13. Events Of Default
>
> (1) *Events of Default*
>
> *The occurrence of any of the following events at any time shall constitute an Event of Default under this Agreement, whereupon the Bank may, at its sole and absolute discretion,* withhold, withdraw, *recall* or cancel *the Facilities and/or declare and demand the Indebtedness to be immediately due and payable:-*
>
> (a) …
>
> …
>
> …

(b) *Breach of Other Obligations and Warranty*

if the Borrower or any Security Party *shall be in breach* of any representations or warranties *or default in the due performance of any covenants,* conditions *or obligations on its part to be performed and observed herein* or in any of the Security Documents or in any notice, opinion, certificate or document delivered pursuant to or in connection with the Facilities or this Agreement and fails to remedy such breach or default within the time frame stipulated by the Bank in its notice to the Borrower or such Security Party requesting action to remedy the same; (emphasis added)

It is an irrefutable fact that the respondents did not comply with the appellant's notice to provide further security, and, we reiterate, the respondents thus committed an event of default under cl. 13(1)(b) of the facilities agreement. Based on the terms of the contract, since the respondents had committed an event of default, the appellant had the sole and absolute discretion to recall the loan and declare and demand the loan to be immediately due and payable.

[11] It is not in dispute that the letter of offer and the facilities agreement are a valid contract. In law, where it is shown that a contract entered into between the parties thereto is valid, it would be incumbent upon the court to uphold the bargain that has been struck between the parties and in the instant action, the appellant and the respondents and this bargain is housed in the clear terms of the contract documents. Reference in this connection, may be made to a passage in the judgment of this court in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22 which ended with the following words:

… Thus, if the contract is not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue influence, etc. *the court had a duty to defend, protect and uphold the sanctity of the contract entered into between the parties.* (emphasis added)

[12] It is also necessary to emphasise that equity cannot aid a party trying to avoid its contractual liability. A bank's right to enforce a contractual provision to require further security came up for consideration in *Bank Industri & Teknologi Malaysia Bhd v. Ironwoods Shipyard Sdn Bhd & Ors* [2006] 6 CLJ 269. In allowing an application for summary judgment, Clement Skinner J (later JCA) in that case at p. 282 said:

[35] As far as the 1st defendant is concerned section 10.02 of the Bridging Line Agreement allows for the plaintiff taking further security and reads:

Section 10.02 Covenant to Provide Further Security

The Borrower shall at any time if and when required by the Bank so to do execute in favour of the Bank as the Bank shall direct such legal or other mortgages charges assignments transfers or agreements or as the Bank shall require of and on all the Borrower's estate right title and interest in any property or assets or business now belonging to or which may hereafter be acquired by or belong to the Borrower (including

A any vendor's lien) and the benefit of all licences held in connection therewith to secure all moneys and liabilities hereby agreed to be paid or intended to be hereby secured such mortgages charges assignments transfers or agreements to be prepared by or on behalf of the Bank at the cost of the Borrower and to constrain all such terms and conditions as the Bank may reasonably require.

B …

…

…

[38] *In my judgment the above provisions clearly allow the plaintiff to request for* C *additional security from the 1st defendant* in the form of the undertaking from MBB or Seri Mukali …

[39] *Likewise, in light of the 1st defendant having agreed to cl. 10.02 … which allow for the plaintiff to obtain further security … I do not see how it is open to the defendants to argue that the plaintiff has* waived its rights under the Bridging Line Agreement or *is estopped from enforcing its rights thereunder. The 1st* D *defendant is clearly bound by the contract it has made and equity will not come to its or the other defendants' aid in trying to avoid their contractual liability* in the circumstances disclosed in this case. *There is nothing unconscionable or unjust in the plaintiff exercising the very rights and remedies that the defendants agreed it should have* in the Bridging Line Agreement and Guarantee. (emphasis added)

E

[13] From what we are able to glean from the grounds of judgment of the learned judge in this case, His Lordship had referred to the aforesaid cases but so far as the judgment shows, save for giving lip service to these cases, His Lordship did not follow the principles laid down therein. In particular, F the learned judge did not give any reasons for departing from the principles of law enunciated in *Bank Industri & Teknologi Malaysia Berhad v. Ironwoods Shipyard Sdn Bhd & Ors, supra*, which dealt with the right to call for further security. In our judgment, the learned judge erred in law when His Lordship held:

To conclude that the Defendants had committed a default this court have G to be *(sic)* look at the events that led to the default. The Defendants are **entitled to know** how and why there was a substantial difference in the valuation. They are **entitled to know** whether in those circumstances they really did commit a default in not furnishing further security. (emphasis added)

H **[14]** With deference to the learned judge, His Lordship disregarded a fundamental rule in law of contract, that is that, it is not for the court to rewrite a contract freely entered between two contracting parties or to read into contract conditions that have not been put there by the parties. Needless to say, if the court were to adopt that stance, contractual rights would be rendered illusory and it will have serious and far-reaching commercial I consequences. The judicial authorities referred to above clearly show that it is imperative that contractual rights are recognised and enforced. It is not for the courts to rewrite a contract or bargain made by the parties. For there to

be commercial efficacy and certainty, contractual terms agreed to by the parties should be enforced. Otherwise, it would result in chaos and commercial activities would grind to a halt if parties are not entitled to determine for themselves the rights and obligations to be given or assumed under a contract. We should emphasise that this is a logical and acceptable construction which parties ought to bring to bear upon a contract which they have agreed to enter into upon which terms they agree to be bound.

[15] In the present case, cl. 12(3) of the facilities agreement gives the appellant an unrestricted and unimpeded right to require the respondents to furnish further security. There is nothing in cl. 12(3) that requires the plaintiff to give any ground or justification or reason for the exercise of the right under the said clause. Thus, even though the appellant exercised the right in the present case after a second valuation of the charged property showed a diminution in the value, this did not confer any right on the respondents to "know how and why there was a substantial difference in the valuation". The matters the learned judge held the respondents were entitled to know were never agreed to by the contracting parties. The learned judge basically conferred extra rights to the respondents and imposed an obligation on the appellant which the contracting parties had never in the first place agreed to. In the process, the learned judge had also whittled down the appellant's contractual right in cl. 12(3). There is a clear right and obligation of the appellant and the respondents which are manifested in cl. 12(3) of the facilities agreement. The clear and unambiguous words employed in that clause indicate and evince the contracting parties' intention that the respondents irrevocably bind themselves to furnish further security to the appellant if required by the appellant. In our judgment, there is a good deal of substance in the proposition that the respondents cannot be allowed to renege from the contractual undertaking and obligation which they freely accepted in cl. 12(3) or if this is to be allowed by the court, it will be to declare open season on all Malaysian banks where borrowers will execute security documents and obtain the release of loans only to be free later to question their obligations and a bank's contractual rights in those security documents. This surely cannot be the aim or purpose of either law or equity.

[16] The position adopted by the respondents has been described earlier in the judgment. The respondents' case we should say primarily is an attempt to deflect attention from their contractual obligation or liability to the appellant under cl. 12(3) and their breach of that contractual obligation. Their defence is that they did not commit any default in the payment of the instalments. This appears to or may have found some favour with the learned judge when His Lordship said:

> **The Defendants here were not disputing the contractual rights of the Plaintiff** but that the second valuation of the Property and that **they did not commit any default in respect of the instalments.** Clearly from the sum claimed in the Writ, the Defendants had made monthly payments without fail which was supported by the Defendants' bank statement exhibited as "Exhibit F" in enclosure 7. (emphasis added)

[17] With respect, the respondents' claim that they did not default in the payment of monthly instalments is not and cannot be a defence to the breach of their obligations in cl. 12(3). It cannot be denied that the contract documents contain a number of obligations to be performed by the respondents. Surely the respondents cannot release themselves from each of those obligations simply by raising the defence that they unfailingly make monthly payments for their loan. The reason is very simple. If parties to an agreement are allowed to do that, they can all start to pick and choose which contractual obligation they wish to perform, and which need not to be performed. This certainly cannot be the legal position. In the circumstances, it is our judgment that the contention that the defendants have been paying their monthly instalments regularly is wholly untenable and no answer to their clear breach of cl. 12(3) of the facilities agreement.

[18] We next consider the respondents' argument that the value of the existing security is sufficient to cover the loan. What has emerged from the clear stipulation in cl. 12(3) is that, there is absolutely nothing therein that bars the appellant from requiring further security even if the existing security is sufficient to cover the loan sum and such a bar, we would say, cannot be implied or read into the said clause. Learned counsel for the respondents offers further reasons in his submission when he argues that there was an earlier valuation report by JS Valuers Property Consultant (Johore) Sdn Bhd when the loan was taken in which the property was valued at RM3.5 million. However, five months later, the property was valued for RM858,000 as at 29 July 2015. It is only at the trial the respondents can debunk the disputed second valuation by cross-examination of the valuer. As there are triable issues in respect of the valuation, it has been argued that it is not open to this court to dispose of the matter summarily by affidavit evidence.

[19] The simple fact is that the first report was an earlier valuation report. There is a current valuation which fixes the value of the existing security at RM858,000 only. The respondents on the other hand, have not produced another current valuation to show that this latest valuation of the property is less true than it has been made to appear. Furthermore, there is a very material distinction between the earlier and current valuation report. The earlier valuation report states that the "basis of valuation is market value with vacant possession in its existing condition (unless otherwise stated) and on the basis that a certificate of fitness for occupation is issued, …". The report also states that "the subject property is newly completed. At the time of our inspection, the subject building is maintained in good state of repair. … Electricity mains and water mains supplies are available in the vicinity and are connected into the subject property". The second valuation report, however, states that "it is currently erected upon with a 1½ storey detached factory of standard-built dimension and design and which has been completed in its construction save for the electrical, sanitary and firefighting installations which are pending supply. The property is also pending issuance of certificate of fitness (CFO) by the local authorities."

[20] There is without doubt, a clear reason for the material difference in the price of the charged property. To reiterate, the respondents have not produced a single shred of evidence or another professional valuation to expose the falseness or inaccuracy of the current valuation or to prove that the existing security has in fact been completed and the CFO has been issued. Under these circumstances, it must be concluded that the diminution in value of the security is real and not bogus. It is not the obligation of the appellant to inquire into the discrepancies or disparity in the earlier valuation report. The appellant has ample justification to invoke its rights under cl. 12(3) to require the respondents to furnish further security. Such invocation we presume, is in the best interest of the appellant so that in the event of a default, the appellant's chances of recovering the outstanding balance of the loan would not be adversely affected by any deficiency in the security provided. The respondents' failure to furnish further security was thus a material breach of the contract that entitled the appellant to terminate the loan.

[21] The present case involves nothing more than an enforcement of the appellant's contractual rights as provided for under the facilities agreement. The irrefragable fact is that the respondents are bound by the terms and conditions of contract stipulated in the letter of offer and the facilities agreement. Their defence does not address or touch on such contractual rights in cl. 12(3) of the facilities agreement to require the respondents to furnish additional security. It is clear in O. 14 r. 1(1) of the Rules of Court 2012 that the appellant is entitled to apply to the court for judgment on the ground that the respondents have no defence to the claim included in the writ. There is overabundance of local judicial authorities on legal principles governing an application for summary judgment and the law must now be taken to be well settled. It would suffice for the purpose of expressing our rendition of the law on summary judgment as we understand it, to reproduce the following excerpts from the judgment of Mohamed Azmi SCJ in the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400:

> In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court …
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute in equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this

A principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

B

The respondents fail to satisfy this court in accordance with O. 14 r. 3(1) of the Rules of Court 2012 that there is an issue or question in dispute manifested in the defence and affidavit in reply which ought to be tried or that there ought for some other reason to be a trial of that claim. We are satisfied that the respondents have no defence, in law or on the facts, to the C claim included in the statement of claim. In the result, such a defence is unsustainable and obviates the need for a full trial.

Conclusion

[22] For all these reasons, we could not accede to the submission urged for D the respondents. It is plain that the conclusion reached by the learned judge that there was a triable issue and that the court had to investigate the reasons for the difference in the two valuation reports is unreasonable and erroneous. We make this finding as it is obvious to us that the reasons discussed above show that there is no triable issue and the learned judge ought to have E exercised his discretion to allow the summary judgment application. The difference in the two valuation reports has nothing to do with the exercise of the appellant's right under cl. 12(3), and it did not qualify as a triable issue. The issue at hand is the proper and correct interpretation of the facilities agreement, in particular cls. 12(3) and 13 thereof. In this regard, we are F satisfied that the appellant had properly exercised its contractual right pursuant to the facilities agreement. Accordingly, the bottom line is that the nature of the respondents' defence inevitably attracts the application of O. 14 of the Rules of Court 2012. In the upshot, it is apt in the circumstances of the case that this appeal be allowed. The order of the High Court dated 9 August 2016 is set aside and we accordingly give judgment on the claim G as prayed in the statement of claim. Costs of this appeal is fixed at RM10,000 to be paid by the respondents to the appellant subject to the payment of allocatur fee.

H

I